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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 95

CATHERINE LLEWELLYN VAN WART, By Roy M. Van Wart, Natural Tutor, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

FREDERICK R. GIBBS,
PRESTON B. KAVANAGH,
Counsel for Petitioner.

June 6, 1934.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CATHERINE LLEWELLYN VAN WART, By Roy M. Van Wart, Natural Tutor, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Catherine Llewellyn Van Wart, a minor, by Roy M. Van Wart, her natural tutor, and guardian, respectfully shows:

A.

Summary Statement of Matter Involved.

This is a petition for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in said Court on March 12, 1934. This

judgment reversed an unreported decision of the United States Board of Tax Appeals which found that there was no deficiency in income taxes for the calendar year 1924.

The sole question involved is whether attorneys' fees, incurred and paid by the guardian in his fiduciary capacity, for conducting certain litigation which resulted in securing for the guardianship a substantial amount of income, are a business expense under the provisions of the Revenue Act of 1924 and therefore deductible from gross income in the income tax return filed by the guardian on behalf of the minor.

The facts are contained in a stipulation (R. 19-21) and in the decision of the Circuit Court of Appeals, Fourth Circuit, of *Van Wart v. Jones, et al.*, 295 Fed. 287, which decision by reference was made a part of said stipulation of facts.

Catherine Llewellyn Van Wart, a minor, was the beneficiary of a trust created by the will of her grandfather, Jenkins Jones, deceased. Her father, Roy McLean Van Wart, was appointed by the Civil District Court in New Orleans, Louisiana, as her natural tutor or guardian on May 6, 1921. Upon demand by the guardian for the income due the minor, the trustees under the will of Jenkins Jones took the position that the income of the trust was to be accumulated until the minor became of age, when she was to receive the corpus. Thereupon Roy Van Wart, as guardian of petitioner, employed counsel and filed suit to compel the trustees to distribute the income of the trust estate as currently earned. A favorable decree was finally entered by the Circuit Court of Appeals for the Fourth Circuit in *Van Wart v. Jones, et al., supra*, and accordingly the trustees in 1924 paid to Roy Van Wart, as guardian, accumulated income of $159,094.16 and thereafter paid the 1924 income of $80,241.68. Under authority of the Court appointing the guardian, attorneys' fees of $30,000 were allowed and paid in 1924 by the guardian for services in this litigation.

In the income tax return for the year 1924, filed by Roy Van Wart as guardian of petitioner, the sum of $30,000 was claimed as a deduction from gross income. The respondent disallowed the deduction as not being a business expense, but on appeal to the United States Board of Tax Appeals petitioner's contention was sustained (R. 22). The Circuit Court of Appeals reversed the decision of the Board of Tax Appeals and held that the payment of attorneys' fees was an expense personal to the minor and therefore not deductible (R. 33). In so holding the Circuit Court held contrary to the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner of Internal Revenue v. Wurts-Dundas*, 54 Fed. (2d) 515, where under similar facts that Court held that the payment of attorneys fees by the guardian was an expense incident to carrying on the business of administering the ward's estate and hence deductible as a business expense in the guardian's fiduciary return.

B.

Reasons Relied Upon for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals of the Fifth Circuit, holding that the payment of attorneys' fees is a personal expense to the minor and therefore non-deductible under Section 215 (a) of the Act is in direct conflict with that of the Circuit Court of Appeals of the Second Circuit in *Commissioner v. Wurts Dundas, supra.*

2. The Circuit Court of Appeals has decided an important question of Federal Income Tax law which has not been, but should be, settled by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on

its docket No. 6990, *Commissioner of Internal Revenue v. Catherine Llewellyn Van Wart, by Roy M. Van Wart, Natural Tutor,* and that the judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

CATHERINE LLEWELLYN VAN WART,
By Roy M. Van Wart, Natural Tutor.

By FREDERICK R. GIBBS,
PRESTON B. KAVANAGH,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 33) is reported in 69 Fed. (2d) 299. The opinion of the United States Board of Tax Appeals (R. 21) reversed by the Circuit Court, is unreported.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 347, Title 28, U. S. C. Final judgment of the Circuit Court of Appeals sought to be reviewed was entered on March 12, 1934 (R. 36).

III.

Statement of the Case.

A statement of the case has been given under heading "A" in the petition and for the sake of brevity is not repeated here.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding that the expense of attorneys' fees incurred and paid by the guardian in his fiduciary capacity was an unalllowable deduction upon the income return filed by the guardian.

2. The Circuit Court of Appeals erred in finding and holding that such expense was not an ordinary and necessary expense incurred by the fiduciary in carrying on the business of administering the guardianship matter.

3. The Circuit Court of Appeals erred in finding and holding that such expense was an unallowable personal expense of the minor child.

V.

Summary of Argument.

A. Statutes Involved.

B. The decision of the Circuit Court of Appeals in the case at bar is in conflict with that of the Circuit Court of Appeals for the Second Circuit in *Commissioner of Internal Revenue v. Wurts-Dundas,* 54 Fed. (2d) 515.

C. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

1. The guardian in his fiduciary capacity, and not the minor, is the taxpayer.

VI.

Argument.

A. Statutes Involved.

Revenue Act of 1924, C. 234, 43 Stat. 254;

Sec. 214. (a) In computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * * (c. 234, sec. 214, 43 Stat. 269.)

Sec. 215. (a) In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses; (c. 234, sec. 215, 43 Stat. 271.)

Sec. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * * * * * *

(2) Income * * * collected by a guardian of an infant which is to be held or distributed as the Court may direct;

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. * * *

(c. 234, sec. 219, 43 Stat. 275.)

Sec. 200. (b) The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

(c. 234, sec. 200, 43 Stat. 254.)

Sec. 225. (a) Every fiduciary * * * shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, * * *

(4) Every estate or trust the net income of which for the taxable year is $1000 or over;

(b) * * * Any fiduciary required to make a return under this chapter shall be subject to all the provisions of this chapter which apply to individuals.

(c. 234, sec. 225, 43 Stat. 280.)

Sec. 2. (a) (9) The term "taxpayer" means any person subject to a tax imposed by this Act.

(c. 234, sec. 2, 43 Stat. 254.)

B. In *Commissioner of Internal Revenue v. Wurts-Dundas*, 54 Fed. (2d) 515, (certiorari not applied for) the Circuit Court of Appeals, Second Circuit, affirmed the decision of the United States Board of Tax Appeals, in 17 B T. A. 881. The Central Union Trust Company, of New

York City, as guardian of Muriel Wurts-Dundas, a minor, was compelled to proceed before the Orphans Court, of Philadelphia, Pennsylvania, for a construction of the will of J. Dundas Lippincott, deceased, and a determination of the income to which the minor was entitled. It was necessary to employ counsel, which employment resulted in a decree upholding the contention of the guardian, which was later affirmed by the Supreme Court of Pennsylvania. The said attorneys were paid $25,000 by the guardian, out of moneys belonging to its ward, which amount was claimed as a deduction in the Federal income tax return filed by the guardian.

The Second Circuit Court of Appeals decided that reasonable attorneys' fees were an ordinary and necessary expense of the guardianship, citing *Kornhauser v. U. S.*, 276 U. S. 145, 152, and were a business expense. At page 516 the Court said:

> "But where a guardian incurs reasonable and necessary expenses in securing the income to which it is entitled as guardian, it is acting wholly in its capacity as a fiduciary, and is carrying on the business of administering its ward's estate. The income received is the income which results from the guardian's conduct of that business, whatever may be the source of the income. The expenses of the guardian are the expenses of that business."

In the case at bar, the Court held that inasmuch as the income secured by the guardian belonged to the ward, and the attorneys' fees were paid out of the ward's money, the expense was that of the ward. Since the expense was not connected with any business in which the ward might have been engaged, it was held, therefore, to be personal and not deductible under Section 215 (a) of the 1924 Revenue Act, citing *Commissioner v. Field*, 42 Fed. (2d) 820.

The *Field* and the *Wurts-Dundas* cases were both decided by the Second Circuit which aptly distinguished these two cases.

C. This Court has never passed on the question whether a guardian is entitled to a deduction of attorneys' fees, as a business expense, in the income tax return which he, as a fiduciary, is charged with filing and where he is subject to the tax disclosed thereon. Petitioner contends that, while the income collected from the trustees of the estate of Jenkins Jones ultimately belongs to the ward, such income is subject to the demands of the guardian and the orders of the Court which appointed him, as well as the proper expenses incurred by the guardian.

1. The Guardian and Not the Ward is the Taxpayer.

Under the heading "Estate and Trusts," Section 219(a) of the 1924 Revenue Act, imposes the tax upon "income of estates or of any kind of property held in trust," including (2) income "collected by a guardian of an infant which is to be held or distributed as the Court may direct." Under Section 219 (b) the tax shall be computed upon the net income of the estate or trust and "shall be paid by the fiduciary," and in Section 200 (b) the term "fiduciary" means "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person." By Section 225 (a) the fiduciary is charged with making the return and (b) of the same section makes him "subject to all the provisions of the Act which apply to individuals." Finally, Section 2 (a) (9) defines the taxpayer as "any person subject to a tax imposed by this Act."

In the face of these various provisions of the taxing Act, it is difficult to see how the Court below could reach the conclusion that this was not "the case of a trust estate of such character that the income derived therefrom is taxable to the fiduciary." The guardian is similar to any other trustee and is a "taxable person" as distinguished from his ward. *Merchants Loan & Trust Company v. Smietanka*, 255 U. S. 509 at 516. The guardian incurred and paid the

expenses, not the ward. He, as fiduciary, was charged with filing the return and paying the tax.

Conclusion.

It is, therefore, respectfully submitted that a writ of certiorari should be granted and that this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

FREDERICK R. GIBBS,
PRESTON B. KAVANAGH,
Counsel for Petitioner.